the fact that "the whole theory of administration of justice in our courts contemplates that judges are persons specially educated in the habits of impartiality and fairness."[18] *H. V. D.*

EVIDENCE OBTAINED BY UNLAWFUL SEARCH AND SEIZURE—Every man's house is his castle. This doctrine of individual liberty has just found a new application and a timely expression in *Silverthorne v. United States.*[1] The prosecution in that case made an unlawful raid on the premises of the defendant, and seized all the private papers to be found, with the intention of using them against the accused. However, in accordance with Weeks v. United States[2] the District Court compelled the prosecution to return all the seized papers to the defendant because of the unlawful manner in which they had been obtained. Then the prosecution, nothing loath, and having in the meanwhile taken photographic copies of all the papers, tried to bring the originals before the court by a subpoena duces tecum directed against the defendant. But the Supreme Court refused to countenance any such device, holding that a defendant is not in contempt in refusing to produce papers, knowledge of which the prosecution obtained by its own unauthorized raid. This rule is a corollary of the general proposition, that evidence illegally obtained cannot be used in criminal cases.

The doctrine of the principal case has sound foundation in the history[3] of the struggle for political rights, and in the principles which that struggle succeeded in making part of the bills of rights of our states and nation. The days before 1776 made common the aggravating incidents of sudden searches and seizures, of the obnoxious writs of assistance, and of the harassing general warrants issued to search private houses for the discovery and seizure of personal papers wherewith to convict their owners of sedition against George III. This constant invasion of the citizens' "indefeasible rights of personal security, personal liberty and private property" provoked the war against tyranny which is reflected in the Fourth Amendment to the Federal Constitution, whereby the political fathers sought to make forever impossible these practices which characterized the despotism of George III, and which were followed in the instant case. Taking common law principles as brought out in the famous John Wilkes cases and more particularly in Entick v. Carrington, they laid down the constitutional rule[4] that

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[18] Oakland v. Oakland Water Front Co., supra, n. 16.

[1] (January 26, 1920) 251 U. S. 385, 40 Sup. Ct. Rep. 182, White and Pitney, JJ., dissenting.

[2] (1914) 232 U. S. 383, 58 L. Ed. 652, 34 Sup. Ct. Rep. 341, L. R. A. 1915B 834, Ann. Cas. 1915C 1177.

[3] See Boyd v. U. S. (1886) 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524; Flagg v. U. S. (1916) 233 Fed. 481, 147 C C. A. 367; Cooley, Const. Limitations (7th ed.) pp. 425 ff, Quincy's Mass. Reports, pp. 395-540, note to Paxton's case of the Writ of Assistance (1761), Quincy Mass. 51.

[4] U. S. Const., 4th Amendment.

"The rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated."

This doctrine of the inviolability of the home has been supported even as far back as 1763 by application to a much earlier principle: that a man should not be compelled to give evidence against himself.[5] Said Lord Camden:[6] "It is very certain, that the law obligeth no man to accuse himself; . . . . [and] that search for evidence [in private houses] is disallowed upon the same principle. There too the innocent would be confounded with the guilty."

It is this protection of the innocent, rather than any tender mercy for criminals or seditionists, that is at the heart of the whole matter. The overzealous are only too ready to harass those against whom there is any suspicion at all, particularly nowadays with respect to such "crimes" as radicalism; and the innocent are incarcerated with the guilty. Witness the wholesale releases that followed the recent raids of the Attorney General, a recidivism outrivalling George III.[7] And as for the really guilty who are discovered by such practices—does the ex post facto accident of discovering incriminating evidence make lawful and proper a raid which otherwise was a public outrage? Indeed to force a confession, not by torture, but by "Compulsory discovery [of the accused's guilt] by . . . . compelling the production of his private books and papers, to convict him of crime . . . . is contrary to the principles of a free government. . . . . It is abhorrent to the instincts of an American. It may suit the purposes of despotic government; but it cannot abide in the pure atmosphere of political liberty and personal freedom."[8]

In the Silverthorne case, Mr. Justice Holmes speaks of the Fourth Amendment as "a provision [not only] forbidding the acquisition of evidence in a certain way . . . . [but also that] evidence so acquired shall not be used before the Court . . . . at all."[9] Such an interpretation has been strongly attacked[10] as

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[5] Says the Boyd case, supra, n. 3, at p. 633: "We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

[6] Entick v. Carrington (1763) 19 Howell State Trials, 1029, 1073. U. S. Const., 5th Amend., incorporates the rule against self-incrimination. For history and discussion, and distinction between the two principles discussed above, see 4 Wigmore on Evidence, §§ 2183, 2264, 2250.

[7] See Report of Investigation signed by Pound, Freund, Frankfurter, Chafee and other well-known members of the legal profession, New York Times, May 28, 1920, p. 6.

[8] Boyd v. U. S., supra, n. 3, loc. cit. 631.

[9] This emphatic language indicates that the Supreme Court will not permit the prosecution to use the photographic copies of the seized papers, which the District Court permitted the prosecution to retain.

[10] 4 Wigmore on Evidence, §§ 2183, 2264; 9 Illinois Law Review, 43.

fallacious. The real wrong, it is maintained, is not the use of the evidence, but the unlawful obtaining thereof. Evidence is evidence, no matter how it is obtained. Hence let the evidence in, it is urged, and then punish the perpetrator of the wrong in getting it; but to permit collateral attack on the evidence is to cheat justice. This criticism sounds well in theory. But in practice it affords a ready aid, if not a direct encouragement, to the unscrupulous prosecutor. He is told the Constitution forbids raiding another's home; but that if he does so anyway, he may use the evidence thus unlawfully obtained with practical impunity. For what punishment is there provided anywhere for one thus flaunting our fundamental law? None, except perhaps the possibility of a civil suit for trespass.[11]

But in view of the historical background to the Fourth Amendment and the evils which it was intended to abolish, for what other purpose was the amendment inserted in the Constitution if not to prevent the use of such evidence? To condone the use of evidence obtained in disregard of the amendment is to make its words meaningless and it "might as well be stricken from the Constitution. The efforts of the courts . . . . to bring to the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[12]

The few cases[13] in California that (by way of dicta) treat of the matter at all seem opposed to this conclusion. But perhaps they may be distinguished on their facts from the Silverthorne case insofar as the latter was one which "the Government planned or at all events ratified," while the California cases seem to be those "of knowledge acquired through the wrongful act of a stranger";[14] at least, it is not clear that the prosecution itself participated in the unlawful seizure, beyond being a "receiver of the stolen evidence." The dictum in People v. Le Doux[15] relied on Adams v. New York.[16] But as that case is definitely overturned, or at least narrowly limited and distinguished away in the Weeks case by the very judge that wrote the opinion in the Adams case, it

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[11] There is no statute specifically making violations of constitutional rights criminal; and although in California these offenses might be punished as mere misdemeanors by stretching such general provisions as Pen. Code, §§ 146, 170, no instance has been found of an attempt to protect constitutional rights even to this extent.

[12] Weeks v. U. S., supra, n. 2, loc. cit. p. 393.

[13] People v. Alden (1896) 113 Cal. 264, 45 Pac. 327; People v. LeDoux (1909) 155 Cal. 535, 546, 102 Pac. 517.

[14] This distinction is suggested in the principal case; perhaps it rests on the point that the chief purpose of the Bill of Rights is to protect the individual against the government, not against wrongs by other private individuals.

[15] Supra, n. 12.

[16] (1904) 192 U. S. 585, 597, 48 L. Ed. 575, 24 Sup. Ct. Rep. 372.

would be fitting that the dicta in People v. Le Doux be disregarded hereafter.

It is true that the Federal cases are no more than persuasive authority in California; the Fourth Amendment is not binding upon the states. But nevertheless it is difficult to see why the California courts should not follow the Federal rule. The Fourth Amendment, upon which that rule rests, was inserted almost verbatim into our state constitution,[17] and with it of course the same purpose of preventing extortion of incriminating evidence, the same attempt to safeguard individual rights against that sort of arbitrary government which would place the liberty of every man in the hands of every prosecuting attorney.

In pre-Revolutionary days the hand of government was heavy on the American colonists and the vivid remembrance thereof compelled the addition of the Bill of Rights to the Constitution. It is not too much to say that the same sort of times, though in a different and better sense, are now coming upon us. With the growing socialization of the state there is the same necessity for protecting the individual against an all-powerful government as then moved the fathers of the nation. Indeed, reformers and radicals seem most anxious of individual rights when their ideas are in the propaganda stage and they need the protection thereof. Now is the time to buttress these rights before the state becomes so paternalistic as to forget the individual altogether. For an extreme illustration, note that the Russian constitution nowhere mentions personal liberties.

In the principal case the accused was a corporation. But of course individuals should not forfeit the protection of the Constitution merely because for business convenience they adopt a corporate cloak.[18] *J. C. S.*

LETTERS ROGATORY: SERVICE OF FOREIGN SUMMONS—In the case of *In re Letters Rogatory out of First Civil Court of City of Mexico*,[1] suit was brought in the courts of Mexico against a resident of New York to recover rent under a contract of lease. The defendant was not in Mexico and had no property there, but by Mexican law a judgment against him would be personally binding because the contract was to be performed there.[2] The

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[17] Cal. Const., Art. I, § 19.

[18] Linn v. U. S. (1918) 251 Fed. 476, 480, says the Fourth Amendment does not protect corporations. But the principal case expressly overrules this. Curiously enough, it has been held (Hale v. Henkel (1906) 201 U. S. 43, 50 L. Ed. 652, 26 Sup. Ct. 370) that a corporation is not a "person" coming within the protection of the constitutional provision against self-incrimination. But the Fourth Amendment as interpreted in the principal case gives the same protection as if the Fifth Amendment were applicable. Perhaps the court is taking a roundabout way of overruling its former holding.

[1] (June 30, 1919) 261 Fed. 652.

[2] Civil Code of Mexico, Art. 26: "They [both Mexicans and foreigners] may also be sued in said courts, even though they do not reside in said places, if they have property which is affected by any obligations contracted or if the same are to be performed in said places."